

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Cincinnati Women's)	
Services, Inc., <u>et al.</u> ,)	
)	
Plaintiffs,)	Case No. 1:98-CV-289
)	
vs.)	
)	
Robert Taft, <u>et al.</u> ,)	
)	
)	
Defendants.)	

O R D E R

This matter is before the Court on Plaintiff Cincinnati Women's Services, Inc., et al.'s motion for stay pending appeal (Doc. No. 129). For the reasons set forth below, Plaintiff's motion is not well-taken and is **DENIED**.

In January 1998, the Ohio General Assembly passed H.B. 421, which made several substantive changes to existing law regulating the provision of abortion services in Ohio. H.B. 421 mandates that a woman seeking an abortion must have an in-person informed consent meeting with a physician at least twenty-four hours before the procedure. H.B. 421 also requires that a minor obtain the consent of one at least one parent before having an abortion, or, in the alternative, obtain judicial consent through

a bypass proceeding. Additionally, H.B. 421 limits the juvenile courts' jurisdiction to one bypass proceeding per pregnancy. In other words, H.B. 421 forecloses the possibility that a minor can re-petition the court for judicial consent after having been denied judicial consent in the first instance. Plaintiffs filed a pre-enforcement lawsuit seeking to enjoin implementation of H.B. 421 on the grounds that it imposes an undue burden on women seeking abortions. The parties entered into an agreed order enjoining enforcement of H.B. 421 pending action by the Supreme Court of Ohio adopting rules governing the judicial bypass proceedings for minors. The case came before the Court in February 2005 for a trial to the bench on the merits. The parties then submitted proposed findings of fact and conclusions of law and the Court heard closing arguments in June 2005.

On September 8, 2005, the Court issued findings of fact and conclusions of law (Doc. No. 123) upholding the constitutionality of H.B. 421 in all respects. In reaching this conclusion, the Court first discussed the difficulty of applying the undue burden standard as enunciated by the United States Supreme Court in Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), in cases, such as this one, that do not involve an outright ban on a particular method of performing an abortion. The problems with Casey's undue burden standard identified by this Court were: 1) the circular reasoning of defining an undue burden as an obstacle that affects a large fraction of the women for whom the regulation is relevant without

identifying when the resulting fraction is "large"; and 2) identifying the proper groups of women who constitute the numerator and denominator of fraction. These problems, the Court noted, were compounded in a pre-enforcement challenge by the lack of any actual data on the impact of the regulation. Nevertheless, the Court held that Plaintiffs could not meet their burden of establishing an undue burden by relying on informed speculation on the likely impact of an abortion regulation.

The Court concluded that Plaintiffs failed to establish that H.B. 421 imposes any undue burdens on the abortion right. In the Court's judgment, Plaintiffs evidence either failed as a matter of law to establish an undue burden or amounted to speculation as to the impact of H.B. 421. As an example of the former, Plaintiffs' evidence tended to demonstrate that H.B. 421 would raise the cost of an abortion by \$100 and delay the performance of abortions by up to two weeks. Nevertheless, prior cases established that these effects do not result in undue burdens even accepting the evidence as being true.

The speculative aspect of Plaintiffs' case was not so much the evidence they presented, but rather extrapolating from their evidence a reliable conclusion that a large fraction of women would be adversely affected by H.B. 421. For instance, Plaintiffs' records showed that they excused approximately 5-10% of their patients from attending an in-person informed consent meeting and of this 5-10% of patients, approximately 7-18% were the victims of domestic violence. While this evidence is not

speculative in and of itself, it failed to establish an undue burden because it did not take into account the fact that under existing law, Plaintiffs were not restricted from excusing women from participating in an in-person meeting. What Plaintiffs failed to show with any reliability was how many women would forego having an abortion when faced with the knowledge that the in-person requirement was mandated by state law and could not be waived.

Another speculative aspect of Plaintiffs' case was the number of minors that would be foreclosed from obtaining abortions as a result of being limited to one bypass petition per pregnancy. One of Plaintiffs' contentions was that a minor could become better educated about the medical consequences of having an abortion and thus she should have another chance to avoid obtaining parental consent. The Court noted, however, that Ohio courts consider a number of factors in deciding whether a minor is sufficiently mature to have an abortion without parental consent. Therefore, it would only be speculative to assume that a second bypass proceeding would result in a different outcome merely because the minor better understood the medical implications of the procedure.

Plaintiffs also contended that that the restrictions on bypass petitions would foreclose minors who develop fetal anomalies in the second trimester of their pregnancies. The evidence did establish that 3% of all women, including minors, experience fetal anomalies which are not detected until the

second trimester of pregnancy. Nevertheless, the Court concluded that a one bypass limitation does not create an undue burden for these minors because, even though 3% of all pregnancies develop anomalies, it would be speculative to conclude that a large fraction of minors who develop fetal anomalies will have already petitioned the juvenile court for a bypass of parental consent. The Court noted that it would require further speculation to conclude that a large fraction of parents, knowing that their daughter was carrying a fetus with an anomaly, would not then consent to her abortion.

On several occasions the Court noted that the fact that some women would be foreclosed from obtaining an abortion as a practical matter as a result of H.B. 421 is insufficient to find that it imposes an undue burden. Memphis Planned Parenthood v. Sundquist, 175 F.3d 456, 463 n.3 (6th Cir. 1999). This was essentially the crux of Plaintiffs' case against H.B. 421 - that it would prevent some unspecified number of women, somewhere, from being able to obtain an abortion. Implicit in Plaintiffs' argument is a contention is that the only relevant group in considering whether a regulation creates an undue burden is those women who are actually foreclosed from obtaining an abortion. If accepted, that argument means that the resulting fraction is 1, in which case no state regulation on abortion would ever pass constitutional muster. Obviously, this cannot be the case because the state would never be able to protect its interest in the potential life represented by the fetus - a result which is

contrary to Casey as well. Hence the need to present evidence rising above mere knowledge that some women will be adversely affected by the regulation.

In any event, the Court determined that H.B. 421 does not create any undue burden and dissolved the parties' joint order enjoining its enforcement. Plaintiffs then moved the Court to stay the judgment for thirty days to allow a reasonable period of transition from the old statutory regime to the new statutory regime. The Court agreed to stay the judgment for two weeks and, accordingly, H.B. 421 is due to go into effect at 5:00 p.m. on September 22, 2005.

Plaintiffs now move the Court to stay its judgment pending resolution of their appeal by the Sixth Circuit Court of Appeals. In their motion, Plaintiffs argue that the Court should stay its judgment because it incorrectly applied Casey. Plaintiffs also contend that the evidence they presented at trial on the impact of H.B. 421 was not speculative. Plaintiffs note that under the Court's analysis of its case, there is likely no evidence which would be sufficient to prevail on a facial challenge to an abortion regulation. Therefore, Plaintiffs contend that they are likely to succeed on the merits of their appeal. Plaintiffs also argue that many women in Ohio will suffer irreparable harm if H.B. 421 goes into effect because, as the Court noted, undoubtedly some women will forego having an abortion rather than comply with the new law. This would be particularly unfair, Plaintiffs contend, where the proper

standard of review on abortion cases is currently under consideration by the United States Supreme Court. Plaintiffs argue that maintaining the status quo best preserves and protects each side's interests while the standard of review is being resolved.

Defendants, of course, oppose staying the Court's judgment pending appeal. Defendants contend that Plaintiffs are not likely to succeed on the merits of their appeal because they too find Plaintiffs' evidence on the impact of H.B. 421 to be speculative. Defendants further contend that Plaintiffs' case fails no matter what the proper standard of review is, therefore, staying the judgment serves no purpose. Furthermore, because of the speculative nature of the evidence, Defendants dispute whether any irreparable harm would result if the Court's judgment goes into effect. Finally, Defendants argue that there is a substantial public interest in allowing H.B. 421 to go into effect because its provisions were designed to protect women by, inter alia, ensuring they receive individualized information regarding their pregnancies and that the decision to go through with an abortion is a fully informed one.

The standard for obtaining a stay of judgment is similar to the standard required to obtain a preliminary injunction. The trial court must consider four factors: 1) the likelihood that the movant will prevail on the merits of the appeal; 2) the likelihood that the movant will be irreparably harmed if a stay is not issued; 3) the prospect that others will

be harmed if a stay is not issued; and 4) the public interest in granting a stay. Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991).

With regard to the first factor, in essence the movant is required to show a likelihood that the district court's judgment will be reversed. Id. If the likelihood of irreparable harm is great, the movant can prevail on a lesser showing on probability of success. Nevertheless, even though ratio of irreparable harm to probability of success is inverse, the movant must still establish that there are "serious questions going to the merits" to obtain a stay. Id. at 153-54.

In evaluating the harm that will occur, the court should consider the substantiality of the injury alleged, the likelihood of its occurrence, and the adequacy of the proof provided. Id. The harm alleged must be both certain and immediate, rather than speculative or theoretical. Id. Moreover, the movant must provide some evidence that the injury has occurred in the past and is likely to occur again. Id.

In this case, Plaintiffs have failed to show that the Court's judgment should be stayed. At the outset the Court observes that it is a bit ingenuous and more than a little ironic that Plaintiffs argue that the judgment should be stayed while the correct standard of review is being resolved given that both parties elected to go forward with a trial on the merits when the Court queried whether a continuance would be in order until the Ayotte case is decided. Having elected to go forward under the

Casey standard, Plaintiffs should not now be afforded relief from the Court's judgment just because the standard is difficult to apply.

Moreover, the Court rejects Plaintiffs' contention that there is no evidence which would ever be satisfactory to establish an undue burden under the Casey standard. For instance, Plaintiffs' evidence might have shown that H.B. 421 would raise the cost of an abortion by \$500. This might have been sufficient to establish an undue burden. Instead, Plaintiffs evidence showed that the cost of an abortion would increase by only \$100. This was insufficient as a matter of law to show an undue burden. Similarly, Plaintiffs' evidence might have established that H.B. 421 would delay abortion procedures by a month. Such evidence might have shown that H.B. 421 creates an undue burden. Instead, Plaintiffs' evidence showed that H.B. 421 would only delay abortions by about two weeks, which again is insufficient as a matter of law to impose an undue burden. Plaintiffs' evidence might have established that abortion protestors completely impede access to clinics and that law enforcement was doing nothing to curb violence against clinics. This kind of evidence probably would have shown that H.B. 421 imposes an undue burden on women. Instead, the evidence showed that abortion protestors do not significantly impede access to clinics and that it has been several years since any serious violence was directed at Plaintiffs' clinic. To be sure, there were many speculative aspects of Plaintiffs' case, but that is

not the same as saying that that no plaintiff could ever prevail under Casey according to the Court's analysis of the evidence.

Thus, the Court finds that its judgment is not likely to be reversed on appeal, regardless of the standard of review. As the Court noted here and in its earlier order, much of Plaintiffs' case failed as a matter of law based on prior decisions. Those conclusions are not likely to be reversed on appeal. The remainder of Plaintiffs' case was speculative in so far as the likely consequences of H.B. 421, not because the evidence was speculative per se, but rather because the conclusions Plaintiffs want to draw from the evidence are speculative. The Court believes that the Court of Appeals is likely to agree with that assessment.

The possibility that irreparable harm will result is related to the likelihood that the Court's decision will be reversed on appeal. Obviously, if the Court's decision is affirmed no irreparable harm results from denying the stay. The Court notes, however, that Casey, in promulgating an undue burden standard related to some fraction of the relevant group, recognizes that constitutional abortion regulations can and will leave some women without access to abortion services. In other words, unless the relevant group is defined so that the resulting fraction is 1, which the Court has stated cannot be the case, women at the margin, wherever that may be, are permissibly foreclosed from obtaining abortions. Thus, the fact that some women, somewhere, will suffer hardship as a result of the

enforcement of H.B. 421 is insufficient to establish the irreparable harm needed to justifying staying the judgment. Stated another way, because Plaintiffs' contention that H.B. 421 imposes an undue burden for a large fraction of women is speculative, the harm that results from H.B. 421 is within constitutionally permissible bounds.

In this case, the third factor, whether others will be harmed if a stay is not issued, poses the same considerations as the irreparable harm analysis. Plaintiffs filed this lawsuit largely, if not entirely, to benefit third parties not before the Court. Therefore, the Court's irreparable harm analysis applies to this consideration.

Finally, the Court believes that the public interest lies in permitting H.B. 421 to go into effect. The Court recognizes that the public has no interest in seeing unconstitutional laws remain on the books. The Court, however, has determined that H.B. 421 is constitutional. The people of the State of Ohio, through their elected representatives, have determined that H.B. 421 is a necessary public health and safety measure. This statute has lain dormant for seven years while this lawsuit has wound its way to a conclusion. The Court recognizes that much of the delay in the case was due to circumstances beyond the parties' control. Nevertheless, it has been seven years and the people of Ohio are entitled to have this law go into effect without further delay.

The balance of factors weighs against staying the

judgment. Accordingly, Plaintiffs' motion to stay the judgment pending appeal is not well-taken and is **DENIED**.

IT IS SO ORDERED

Date September 22, 2005

s/Sandra S. Beckwith
Sandra S. Beckwith, Chief Judge
United States District Court